Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

THOMAS PALOTAI,
Petitioner,

v.

UNIVERSITY OF MARYLAND AT COLLEGE PARK; HENRY MITYGA; LAURIE HELLMAN-AKER,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

In a 42 U.S.C. §1983 action requesting damages for due process violations in effecting a suspension without pay, whether the court abused its discretion and usurped petitioner's constitutional right to a jury trial when it relied on respondents' extrinsic evidence to dismiss the Petitioner's §1983 claim.

II

In a 42 U.S.C. § 12101, et seq., ADA-qualified action requesting damages for unlawful disability discrimination and retaliation maltreatment, whether the court abused its discretion and usurped petitioner's right to a jury trial when the court granted summary judgment to employer university, but ignored petitioner's competent material direct evidence, by way of affidavits, depositions, interrogatories, medical reports and official documents, sufficient to create "a genuine issue of material fact" requiring resolution by a jury.

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is Thomas Palotai, an individual citizen of the United States, residing in Arlington, Virginia. Petitioner was the Plaintiff in the District Court, and the Appellant in the Fourth Circuit Court of Appeals.

Respondents

Henry Mityga, individual [Head of the Greenhouse Committee]; and Laurie Hellman-Aker, individual [Greenhouse supervisor] were the Defendants in the District Court, and the Appellees before the Fourth Circuit Court of Appeals in the Civil Action Against Deprivation of Constitutional Rights Law, 42 U.S.C.§1983.

University of Maryland at College Park,[1] was the Defendant in the District Court, and Appellee before the Fourth Circuit Court of Appeals in the civil action under the Americans with Disabilities Act [ADA], 42 U.S.C. § 12101 et seq.

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[1] The University waived its Eleventh Amendment immunity by removing the case against it to the District Court. *See Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. __, 122 S. Ct. 1640 (2002).

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Petitioner respectfully petitions for a Writ of Certiorari to review the judgment of the Fourth Circuit Court of Appeals in this case.

OPINIONS BELOW

The decision of the Fourth Circuit Court of Appeals denying the petition for rehearing is unreported and is reproduced in App. A. The judgment of the Fourth Circuit Court of Appeals on the merits is unreported, and it is reproduced in App. B. The District Court Motion for Summary Judgment is unreported and is reproduced in App. C. The District Court Motion to Dismiss is unreported and is reproduced in App. D.

STATEMENT OF JURISDICTION

The judgment of the Fourth Circuit Court of Appeals was issued on June 27, 2002. A timely petition for rehearing was denied by that court on July 23, 2002.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

RELEVANT U.S. CONSTITUTIONAL ARTICLES

ARTICLE VII

The Seventh Amendment to the United States Constitution provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no facts tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law."

ARTICLE XIV

Section 1. of the Fourteenth Amendment of the United States Constitution provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any States deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

I.

42 U.S.C.§ 1983 claim against infringement of constitutional due process under "color of law."

The right of jury trial in civil cases at common law is a basic and fundamental cornerstone of our system of federal jurisprudence which is protected by the Seventh Amendment. "A right so fundamental and sacred to the citizen, whether guaranteed by the constitution or provided by statute, should be jealously guarded by the courts." *Jacob v. City of New York,* 315 U.S. 752, 753 (1942). In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687, 701 (1999), where a § 1983 action sought redress for uncompensated municipal taking of property, the Supreme Court stated that "there can be no doubt that claims brought pursuant to §1983 'sound in tort.' Just as common-law tort action provides redress for interference with protected personal or property rights, §1983 provides 'relief for invasion of rights protected under federal law.'" Citing *Heck v. Humphrey,* 512 U.S.

477, 502 (1994), "... [l]anguage of 1983, which speaks of 'deprivations' of 'any' constitutional rights, privileges or immunities, by '[e]very' person 'acting under color of state law,' and to which 'we have given full effect' [recognizes] that [1983] 'provides a remedy to be broadly construed, against all forms of violations of federally protected rights.'"

The petitioner's 42 U.S.C. §1983 action[2] against his supervisors, Hellman-Aker and Mityga, is for legal redress of damages, resulting from their unconstitutional misuse of power under color of state law, which caused the petitioner's suspension without pay from his classified, permanent, full-time position at the University of Maryland. On June 5, 1997 Department Head Weismiller (at the instance of supervisor Hellman-Aker) issued a peremptive suspension without pay letter to the petitioner, without reasonable notice, effective immediately. The June 5, 1997 suspension without pay letter also stripped the petitioner of all university rights and privileges immediately. The suspension letter admonished the petitioner that he was not authorized thenceforth to be in any area of the greenhouse workplace, and that he had to

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[2] Civil Action Against Deprivation of Constitutional Rights Law, 42 U.S.C.§1983, which states specifically that:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...."

surrender all his keys to Hellman-Aker the day of the suspension without pay.

The petitioner, as a classified, full-time, permanent [tenured] employee, had a "cognizable property right" in continued state employment which was "entitled to full due process protection," *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 533, 542, (1985). *Loudermill* requires that the "pretermination process" must, as a minimum, provide "oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity for the employee to tell his side of the story." As the petitioner indicated in his complaint, at pp. 7 & 12, he had none of the required "pretermination" due process. He "received no prior notice of the charges against him," "no explanation of the charges against him," and he had "no opportunity to oppose the charges before being deprived of his property right in his continued employment.

The petitioner was summarily suspended without pay on June 5, 1997, "pending charges of removal" which he received on June 17, 1997. The petitioner's constitutional due process rights were likewise infringed substantively and procedurally by his failure to receive a timely or fair *post-deprivation* suspension hearing. Maryland State Code EDUC 13-205(e) mandates an early hearing and decision on the suspension itself [hearing within 5 days after receipt of suspension appeal, with non-appealable final written decision to be rendered 5 days after hearing.] Petitioner appealed the suspension the same day it occurred on June 5, 1997, so that the suspension hearing should have been initiated by June 10, 1997 and a decision rendered by June 15, 1997. Instead, the suspension hearing began only on July 10, 1997, three weeks after the petitioner had already been issued removal specifications on June 17, 1997, and took nearly three months

to complete. In addition to being untimely, the *post-deprivation* suspension hearing was substantively deficient, in violation of Maryland State Code EDUC 13-205(e)(4) and (5), denying the petitioner a fair trial. At the hearing, where petitioner was not represented by counsel, his rebuttal testimony, which disproved the validity of all four suspension charges, was ignored. Petitioner's discovery request for his official work list sheets for the time period May 30 - June 5, 1997, and his request for testimony by eye witness [McGrath] were both denied. Based on respondents' unsupported allegations about petitioner's violations of safety regulations on toxic chemicals, the hearing officer ruled erroneously that "the basis for the suspension ... involved Palotai's [petitioner's] 'failure to take appropriate safety measures when handling pesticide.'" *N.B.* Not one of the four suspension charges at issue involved "handling pesticides" by the petitioner.

The court of appeals erred as a matter of law when it upheld the district court's perfunctory dismissal of petitioner's § 1983 due process claim relating to his suspension without pay. The appeals court failed to follow the fourth circuit's own evidentiary standard precedents which require the appeals court's review of a district court's dismissal of a complaint under Rule 12(b)(6) *de novo.* The appeals court erred by failing to make any *de novo* review of the "sufficiency of the facts" in the petitioner's complaint. As stated in *Edwards v. City of Goldsboro,* 178 F. 3d 231, 243 (4th Cir. 1999), a Rule 12(b)(6) motion to dismiss should only be granted by the court if, "after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all factual inferences from those facts in the plaintiff's favor, it appears 'certain' that the plaintiff cannot prove '*any*' set of facts in support of his claim entitling him to relief." In accordance with *Baird Ex Rel. Baird v. Rose,* 192 F. 3d 462, 467 (4th Cir. 1999), the

appeals court, if it had done a *de novo* review, as required by fourth circuit declared precedent, the court must "have accepted as true the facts as alleged by the [petitioner] in his complaint, viewed them in the light most favorable to him, and also recognized that dismissal was *inappropriate* 'unless it appeared to a certainty' that the [petitioner] would be entitled to no relief under 'any' state of facts which could be proved in support of his claim."

Fourth circuit evidentiary standard precedents also require, in implementing Rule 12(b)(6), that a court *must convert,* by operation of law, a motion to dismiss into a motion for summary judgment when the court accepts into the record extrinsic matters "outside the pleadings." As stated in *Finley Lines J.T. Protect Bd. v. Norfolk So. Corp.,* 109 F. 3d 993, 996 (4th Cir. 1997), a district court has "'discretion' to determine whether or not to exclude matters outside the pleadings. However, if the court 'includes' matters outside the pleadings, the 'conversion' takes place at the time the court 'affirmatively decides' not to exclude extrinsic matters." As further stated in *Finley Lines, Id.,* "[if] ... matters outside the pleadings are *presented to and not excluded by the court,* the motion [to dismiss] shall be treated as one for summary judgment and disposed of as provided in Rule 56 Fed. R. Civ. P. 12(b)(6) (emphasis added)."

After the legal conversion to a summary judgment evidentiary standard, the nonmoving party, to avoid summary judgment has to prove that there is a "genuine issue of material fact" which then requires resolution by a jury trial. The court has an affirmative obligation under Rule 56(c) to give the nonmovant "' reasonable notice,' that the motion under consideration by the court has been 'changed' [converted] to a summary judgment motion." Under Rules 12(b)(c) and Rule 56(c), the court must give the nonmovant

party "a reasonable opportunity to present all material pertinent" to the summary judgment motion such as affidavits, additional testimony, depositions, and interrogatories. No legal conversion to a summary judgment motion was made by the district court in petitioner's case as required by Rules 12(b)(c) and 56. The district court erred as a matter of law in accepting into the record, and relying on, respondents' material "outside the pleadings" to dismiss the petitioner's case.

After the appeals court had failed to make a *de novo* review of the "sufficiency of petitioner's complaint" as required under Rule 12(b)(6) [see *infra*], the court further erred as a matter of law when it not only accepted but applauded the district court's reliance on respondents' extrinsic evidence "outside the pleadings" in the form of supervisor Hellman-Aker's "report" of 42 *uncorroborated* accusations of infractions by the petitioner as the basis for the decision dismissing petitioner's case. Nor, contrary to Federal Rules 12(b)(6) and 56, was any attempt made by the appeals court to apply the summary judgment standard of proof for the nonmovant petitioner upon the court's acceptance of the extrinsic evidence of respondents' "report" to uphold the district court's dismissal.

The appeals court made the most egregious error of law when it expounded on the "credibility" of the Hellman-Aker "report" as "'proof' of 'probable cause,' *without necessity of corroborating evidence*, to believe that 'immediate suspension' of petitioner was required." [See opinion, pp. 8-9]. The appeals court usurped petitioner's right to a jury trial and abused its discretion when the court asserted the "credibility" of respondents' "report" as the deciding factor in the case while giving no credence at all to the petitioner's evidence which he proved was sufficient to

"raise a genuine issue of material fact" necessitating resolution by a jury.

As was stated by the U.S. Supreme Court in *Anderson v. Liberty Lobby, Inc.*,477 U.S. 242, 243 (1986):

> "[A]t the summary judgment stage, the trial judge is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue [of material fact] for trial." *Id* at 250: " ... the threshold inquiry [is] of determining whether there is any genuine factual issues that can properly be resolved only by a finder of fact because they may reasonably be resolved in favor of each party."

The appeals court made a serious error of law when it abused its discretion and acted as if it were both judge and jury when it proclaimed that the Hellman-Aker "report," with *no corroborating evidence*, was the only "credible" evidence to the exclusion of all other. "'Summary judgment' is not the chance for the court to act as jury and determine witness credibility, weigh evidence, or decide upon competing inferences." See *Wilkerson v. P.I.A.,Topeca Inc.*, 900 F. Supp. 1418 (1995).

On July 18, 2000 the district court, having used respondents' extrinsic evidence "outside the pleadings" as the basis for its decision, erred in failing to convert to a summary judgment standard of proof for the nonmovant petitioner as required under Rules 12(b)(6) and 56. Therefore, the district court denied the petitioner the right to amend his complaint or to obtain "other material made pertinent as required" under Rule 56(e) to include affidavits and further testimony.

However, the petitioner was given the opportunity by the district court to obtain these documents in another portion of the case. The petitioner's subsequent affidavits, depositions, and interrogatories, along with official work documents, were entered into the record and accepted by the appeals court on May 21, 2001. The appeals court, in receiving these documents into the record at that time, was obliged legally to convert respondents' motion to dismiss petitioner's §1983 claim into one for summary judgment. See *Smith v. Yellow Freight System, Inc.*, 536 F. 2d 1320, (10th Cir. 1976), providing that "... [w]here certain exhibits and affidavits were submitted and not excluded by the court in ruling on a motion to dismiss, the motion to dismiss was converted into a motion for summary judgment." The appeals court failed to consider any of the nonmovant petitioner' documents, which were entered into the court record, in the light of whether they constituted probative evidentiary facts posing a "genuine issues of material fact," appropriate for resolution by a jury.

The appeals court further abused its discretion when it not only disregarded all of the petitioner's evidence in the form of affidavits, depositions, and official documents, but declared they had "no credence" with regard to proving the untruthfulness of the Hellman-Aker "report" of *uncorroborated allegations* against the petitioner. As stated in *Leonard v. Dixie Well Service & Supply, Inc.*, 828 F. 2d 291 (5th Cir. 1987), a court may discount evidence as "unspecific" or immaterial." However, a court does not have discretion to characterize the evidence as "unbelievable" [or not credible] as the appeals court did with petitioner's evidentiary documents.

Under the "summary judgment" standard of evidence, which the appeals court was legally obliged to use, summary

judgment for the moving party [respondents] was improper if the court had found a "genuine issue of material fact." In making a summary judgment determination, as stated *In re Donnary,* 184 B.R. 767, (1995), the "ultimate question is 'whether reasonable minds could differ as to factual interpretation of evidence of record.'" The appeals court did not attempt to address this question in petitioner's §1983 case.

Petitioner's suspension without pay, implemented immediately by the Weismiller suspension letter of June 5, 1997, effectively terminated him from his agricultural technician III position. As the basis for his suspension, the suspension letter accused the petitioner of four recent "safety" violations, trivial in nature as follows:

> "On Friday, May 30, 1997, you were verbally counseled by your supervisor for failing to wear protective eye equipment while in the greenhouse area during the re-entry interval as required by E.P.A. Worker Protection ...."
>
> "On Monday, June 2, 1997, you again disregarded instructions in your failure to accurately record pesticide applications for each greenhouse as required by your supervisor to meet Maryland Department of Agriculture standards."
>
> "On Wednesday morning, June 4, 1997, you were found without appropriate protective eye-wear in an area that had been sprayed the night before."

> "This morning, June 5, 1997, you were working in shorts in an area requiring protective leg-wear."

The petitioner presented evidentiary proof in the form of affidavits, depositions, and official documents which refuted the four suspension charges in their entirety, exonerated him from commission of any of the alleged "safety" violations, and proved that the four incidents alleged were merely "figments" of Hellman-Aker's imagination. The depositions of McGrath [another supervisor] and of Weismiller himself impeached the credibility of supervisor Hellman-Aker's testimony, which she embellished as she went along, inferring that the four suspension charges proved that "he did not take appropriate safety measures while handling pesticide." The petitioner proved that *none* of the four suspension charges *involved handling pesticides*. [N.B. the four suspension charges were among the *uncorroborated* accusations in the Hellman-Aker "report," relied on by the respondents throughout both their motion to dismiss the petitioner's §1983 case involving due process violations in connection with his suspension without pay and also in the respondent university's motion for summary judgment of petitioner's ADA claim.]

Specific evidence relied on by the petitioner to disprove seriatim the suspension charges is as follows: petitioner proffered copies of his official work lists for May 30, 1997 and June 4, 1997, which described petitioner's duties in the greenhouse on the dates in questions and contained supervisory comments, if any, on performance. [Weismiller Dep. of November 10, 2000, Exhibits 2 & 4; JA 414 & 419]. These worksheets provide incontrovertible documentary evidentiary proof that there was "no verbal counseling" by Hellman-Aker on petitioner's "failure to wear

protective eye-wear" on either May 30, 1997 or June 4, 1997. Hellman-Aker's allegations to the contrary in the suspension charges are false.

The petitioner also proved conclusively that the suspension charge of June 2, 1997 was false. At the Weismiller deposition [Exhibit 3, JA 415], the petitioner presented conclusive evidence given in an official letter of July 8, 1997 from Dennis Howard, Inspector, Maryland Department of Agriculture [MDA], Pesticide Regulations, that the procedure which the petitioner used to record pesticide applications was in accordance with MDA regulations.

The last suspension charge, that of June 5, 1997 [the very day the suspension letter and suspension termination without pay was issued], was the most nonsensical of all of the false charges against petitioner. He was accused of having "worked" that morning "in shorts in an area requiring protective leg-wear" [without specifying in what area he was allegedly found which required "protective leg-wear"]. McGrath testified in her deposition of November 8, 2000 [JA 195] that she had seen the petitioner "only walking" down the hallway of the greenhouse. She had no idea where he was coming from nor where he was going. However, two things were clear: the petitioner was not working at the time, and no "protective leg-wear" is required for anyone walking down the hallway.

The asserted reasons given [in the four suspension charges] for petitioner's suspension without pay were false. Hellman-Aker was the state official who deliberately withheld "exculpatory material," only in her possession, at petitioner's suspension hearing. Petitioner discovered, long after he had been suspended without pay and suffered irreparable injury

from the public disclosure of these false stigmatizing reasons for his discharge, that his official work lists for May 30 and June 4, 1997, proved by clear and convincing evidence that his suspension charges were false and had been fabricated by Hellman-Aker. [Supreme Court stated in *Heck, Id.* 502, damages under §1983 could be given to a person where a state official deliberately withheld exculpatory material].

"Genuine issues of material fact" which the probative material evidence of the petitioner posed at the motion hearing on petitioner's §1983 case which the court should have tuned over to the jury as fact finder were:

(1) Whether, in light of petitioner's unassailable proof that none of the four suspension charges against petitioner was true, do these facts discredit the validity of the Hellman-Aker "report," and also prove that there was no basis for the suspension without pay of the petitioner ?

(2) Whether the petitioner was deprived of his due process rights when Hellman-Aker maliciously, [knowing that it was false], used the four suspension charges to effectively terminate petitioner's employment on June 5, 1997 when on that day he was summarily suspended without pay with no opportunity to oppose the charges before being deprived of his property right in his continued employment?

II.

42 U.S.C. §12101, et seq., ADA claims against unlawful discrimination and retaliation.

Under the Americans with Disabilities Act [ADA], 42 U.S.C. §12101, et. seq., petitioner, a qualified individual with physical and mental disabilities, brought a civil action

against the University of Maryland for damages he suffered as the result of an unlawful pattern of employment discrimination and retaliation directed at him by the university because of his disabilities.

The appeals court made several serious errors of law when it upheld the district court's order granting summary judgment to the respondent university, denying petitioner's ADA claim of unlawful discrimination and retaliation. The appeals court states disingenuously in its opinion [at p. 12] that "'the record' does not contain 'evidence' that would support a finding that [petitioner] has a 'legally relevant disability' for purposes of his ADA claim."

Under Rule 56(c), summary judgment must be granted when the moving party demonstrates that there is "no genuine dispute as to any material fact," and that "undisputed facts of record" require that judgment enter, as a matter of law, for the movant." *RPM Pizza, Inc. v. Bank One Cambridge,* 869 F. Supp. 517 (1994). "Summary judgment" to the moving party is appropriate "only when the court, viewing record as a whole and in light most favorable to the nonmoving party, finds no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law," *Flowers v. Wal-Mart Stores, Inc.,* 927 F. Supp. 962 (1996).

The appeals court erred as a matter of law when it failed to make a Rule 56(c) review of the court record as a whole, including all of the petitioner's evidentiary documents. In *Russek v. Unisys Corp.,* 921 F. Supp. 1277 (1996), the court held that, under the federal rule, "summary judgment is proper [only] if the pleadings, depositions, answers to interrogatories, and admissions on file, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as matter of law."

Notwithstanding the mandate of Rule 56(c), the appeals court ignored all of the petitioner's documents as not being "credible" to prove "a genuine issue of material fact" requiring determination by jury trial. The appeals court made an additional error of law by relying exclusively on the uncorroborated statements of university supervisor Hellman-Aker as being the only "credible evidence" in the case and quotes a two page letter of January 3, 1997 to the petitioner alleging that this letter supported granting summary judgment to the respondent university as a matter of law. The petitioner's constitutional right to a jury trial was usurped by the appeals court when the court abused its discretion and arbitrarily granted summary judgment to the university respondent, while ignoring petitioner's competent material direct evidence, by way of affidavits, depositions, medical reports and official documents, which established that the petitioner had both physical and mental disabilities, posing "genuine issues of material fact" for jury trial with respect to the systematic discrimination and retaliation of the respondent university against his disabilities.

ADA prohibits "discrimination against qualified individuals with disabilities in all aspects of employment." [See 29 CFR §1630, *Equal Employment Opportunity for Individuals with Disabilities*.] A "qualified individual with a disability" is an individual who satisfies the requisite skills, experience, and education requirements of his employment position. At the time of his employment in November 1994, the respondent university determined that the petitioner met all of the "requisite requirements" of the agricultural technician III position for which he was hired. Under ADA § 12102 (2), an individual legally meets the definition of having a "disability" when he has: " (A) a physical or mental impairment that 'substantially limits one or more of the major life activities;' (B) has a proven medical record of such

impairment; (C) when an employer 'regards him as' having a 'substantially limiting impairment' [whether or not one existed]'". See *Rhoads v. FDIC,* 257 F. 3d 373, 390 (4th Cir. 2001).

The petitioner medically proved, that he has a "substantially limiting" physical impairment of "persistently recurrent central serous retinopathy" which periodically impacts his life activity of "seeing" by blinding him in the left eye. This blindness is caused by sensory retina detachment from leakage of serous fluid from the capillary layer of the choroid through a break in the retinal pigment epithelium. The medical records submitted to the court has the diagnoses of two ophthalmologists, specializing in the diseases and surgery of the vitreous and retina, in their expert opinions, petitioner's central serous retinopathy, an uncorrectable medical condition which is a "permanent" impairment. Medical science has not discovered how to treat central serous retinopathy effectively to prevent its periodic recurrence causing serious vision loss. The petitioner's employer, the respondent university, was well aware that he had recurrent central serous retinopathy. The university had on record that during the 2½ years of employment in the greenhouse as agricultural technician III, the petitioner's central serious retinopathy reoccurred several times: in December 1995, then in October 1996, [requiring laser surgery and absence from work on sick leave for two months], and again in early May 1997 [requiring his absence from work for nearly a month] . The university believed that petitioner's impairment was "substantial" and therefore "regarded him as being disabled," which meets the definition of "disability" under 42 U.S.C. §12102(2)(C).

The petitioner also suffers from "substantial" mental illness from obsessive compulsive disorder [OCD] and

learning disabilities [LD] as documented by doctors' medical reports. Petitioner's treating psychiatrist's medical reports make it clear that petitioner had been for years [15 + yrs.] on powerful anti-seizure and antidepressant medications [Klonopin 1.5 mg; Luvox 50 mg.]. Without these medications, petitioner could not perform his major life activities of "learning" and "working." Under EEOC's Interpretive Guidance at 29 CFR §1630.2(j) (1998), " an individual who can perform his major life activities *only* with the help of ameliorative medicine is 'disabled.'" .

Respondent university engaged in a pattern of irrational and unlawful punitive discriminatory and retaliatory actions directed specifically at petitioner's disabilities in violation of ADA. An egregious case in point was on October 7, 1996 when the petitioner had a serious accident to the eye which occurred when he was spraying pesticide in respondent's greenhouse and inadvertently got a spray of pesticide in the left eye, blinding him. The eye accident was caused by respondent's malfunctioning and improperly maintained pesticide sprayer which petitioner was ordered to use on the date of the accident. Respondent university immediately retaliated against the petitioner for having had an eye accident, by forcing him to spray in the greenhouse the next day when he could not see. When blindness in one eye and lack of depth perception keep the petitioner from reading properly his work list indicating the specific area "E 1" to spray, he erred in spraying "F 1" area. "E 1," with his impaired vision, looked like "F1" on the work list. University supervisor, Hellman-Aker, immediately suspended [without pay] petitioner five days from work for making the spraying error. [A further retaliatory action by respondent university took place when petitioner asked for sick leave at the conclusion of his five days suspension, and, instead, he was placed on AWOL].

The eye accident, blinding his eye with toxic pesticide, caused the petitioner to have a major bout with central serous retinopathy immediately thereafter. The petitioner required laser surgery on his retina and was able to return to work only on December 3, 1996. From the time of the eye accident on October 7, 1996 the university took numerous illegal retaliatory actions against him with the intent of terminating him as soon as possible, which was done by the peremptive suspension without pay letter issued to the petitioner on June 5, 1997, effective immediately. The university suspension letter stated that his suspension termination was allegedly because of his "continued disregard for rules, directions and safety standards in the greenhouse" citing four alleged minor safety violations which were said to have taken place in the period May 30 - June 5, 1997 after his return to work from another bout with central serous retinopathy most of the month of May 1997. The suspension letter, stated that the alleged violations were "particularly disturbing in light of [petitioner's] eye injury last fall which occurred as the result of [his] failure to comply with these [safety] standards." [The petitioner also proved by an official communication from MDA [Maryland Department of Agriculture] that the university was culpable for his October 7, 1996 eye accident. MDA issued a Warning Notice to the university and university supervisor Helman-Aker for "violation of MDA safety regulations" by failing to maintain "in proper working order" their spraying equipment, the petitioner had been ordered to use a defective, leaking sprayer which was the cause of his eye accident. [Weismiller Dep. JA 374-376].

Weismiller, who signed off on the suspension letter, drafted by university supervisor Hellman-Aker, admitted at his deposition taken on November 10, 2000 [JA 403-405] that, after the petitioner's eye accident in October 1996, and his ensuing extended bout with central serous retinopathy,

necessitating work absence, numerous meetings took place among university officials. They discussed the potential liability to the university from petitioner's "eye" as the result of his recurrent central serous retinopathy and lengthy absences from work. Indeed, it was no coincidence that within a week after returning to work on May 27, 1997, from a three weeks' bout of central serous retinopathy, that petitioner's university supervisor concocted the four suspension charges, [all of which were proved by the petitioner to be false], as a means of suspending him without pay. The suspension letter also forbade him for ever entering the greenhouse workplace premises again, and terminated all of his other university rights and privileges including his health insurance. The university was also aware that the petitioner had filed a formal discrimination complaint with the Maryland Human Relations Commission on May 12, 1997. The university found it convenient to retaliate against him by means of the suspension termination which it hoped would get rid of the petitioner forever.

"time frames"

Knowing that petitioner had OCD/LD, which caused him to have difficulty in performing work under time pressure, in June 1996, the petitioner's university supervisors placed stringent "time frames" on the work that he was to perform, from that point on. The petitioner was the only university employee performing agricultural technician duties in the greenhouse on whom was imposed "time frames" [exclusively rigid minute-by-minute allocations of time for each task].The university supervisors insisted that the petitioner's performance of his work in accordance with these "time frames" was an "essential" part of his position duties and that the supervisors were using the "time frames" as a "management tool" to assist him in completing his work.

Nothing could have been further from the truth. As time progressed, it was obvious that the university supervisors, in their implementation of the "time frames," were intentionally using the "time frames" to abuse and to discriminate against the petitioner. The "time frames" were standardless. No uniform standard was established by the university for everyone in the greenhouse which spelled out specifically the amount of time that was needed to perform each different kind of work. The time established by the university supervisors in the "time frames," only for the petitioner, was whatever the supervisors said it was. The petitioner was unwittingly doing the "lion's share" of all of the agricultural technician jobs to be performed in the greenhouse. The university supervisors increasingly and knowingly truncated the "time frames" under which the petitioner was to perform work, so that as the weeks progressed the petitioner was assigned more and more work to be completed in any single 8- hour day without lunch or break time. Then, after piling on additional work with less time to perform it, the petitioner's supervisors severely reprimanded him each time he was unable to complete *all* of the work, as laid out in the "time frames," for any given eight hour day. One case in point was on July 25, 1996 when petitioner was given a long list of tasks to complete in 8 hours, which was later proven would take a minimum of 10¾ hrs. to complete. Petitioner was reprimanded by his university supervisors for not completing his work list within 8 hours. Dept. Head Mityga, in his deposition of November 3, 2000 [JA 264], after reviewing the particulars of the July 25, 1996 work list, admitted that he had signed off on the written reprimand, on the advice of university supervisor Hellman-Aker, without ever speaking to the petitioner. Mityga agreed in his testimony that it was unreasonable to expect petitioner to perform 10¾ hrs. work in 8 hours. Mityga also stated that had he been aware of the 8 hr. expectation that had been placed on petitioner on the date in

question he would have not signed off on the reprimand for not completing all the tasks. The petitioner was hired by respondent university as agricultural technician III, a classified employment position. Petitioner's duties, including all essential functions of his position, were detailed at length in his *official position description,* which clearly states that employees at this level of agricultural technician III "do not receive instructions on a task-by-task basis." The petitioner's job description gave him direct responsibility for planning how he was to implement his own work in the greenhouse. The abusive "time frames" prescribed by university supervisors, were not an "essential" function of his position. Under 29 CFR §1630.2(n), *Equal Employment for Individuals,* Definitions, "essential functions" means "'the fundamental employment position' which the individual with a disability holds." The micro-management under "time frames," established by the university supervisors only for supervision of the petitioner's work alone, was an illegal change in the "standards, criteria, or methods of administration" used as applied to the petitioner *only* [in violation of 29 CFR § 1630.4, *Discrimination Prohibited*].

The university supervisors had no legal authority to change the "essential functions" of petitioner's position description. The imposition of "time frames" was an illegal change to petitioner's agricultural technician III position description. The Department of Management & Budget has the sole legal authority to change the specifics of a position descriptions, and the level and manner in which a jobs is performed, for the purpose of position reclassification.

The University of Maryland did not met its burden of proof to show that it had legitimate, non-discriminatory reasons to discipline the petitioner. The petitioner's competent, probative material evidence, by way of additional

testimony, affidavits, depositions, medical records, and official documents, proved that the university unlawfully discriminated against him. The university, in the manner in which it imposed "'standardless' time frames" against the petitioner alone in the performance of his agricultural technician III position duties, illegally and unfairly changed the standard of his performance to a different and higher level than that used for the performance of these same duties by everyone else in the greenhouse.

Under the summary judgement evidentiary standard, the petitioner's competent material evidence posed a "genuine issue of material fact" which should have been sent to the jury with regard to the change of standards imposed by the "time frames" on the petitioner alone, i.e.,: whether the "time frames" imposed by the university on the petitioner required him to perform at a different and higher level of performance than required of others in a comparable agricultural technician position, and if so, were the "time frames" then indicative of both discrimination and retaliation against the petitioner?

There is no question that the petitioner introduced into the court record sufficient competent evidence for *prima facie* proof that he was a "qualified individual" with a "substantially limiting" physical disability of central serous retinophaty and also had "substantially limiting" mental disabilities of LD/OCD. The fact that the employer university's "dissembling" statements, used as justifications for punitive action, were proven false in connection with both petitioner's suspension without pay and in the levying of illegal and disparate "time frames" against the petitioner "may permit the trier of fact to conclude that the employer [university] 'unlawfully discriminated.'" *Reeves v. Sanderson Plumbing Product, Inc.*, 530 U.S. 133 (2000).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The decision of the fourth circuit appeals court is incorrect as a matter of law. The appeals court abused its discretion in two instances and usurped the petitioner's constitutional right to a jury trial when the court misinterpreted the proper application of Rule 12(b)(6) to the evidence in granting a motion to dismiss adverse to the petitioner, and also misinterpreted the proper application of Rule 56(c) to the evidence when it granted motion for summary judgment for the respondents.

The court of appeals failed to follow the fourth circuit's own evidentiary standard precedents as well as those of U.S. Supreme Court decisions when it twice violated the evidentiary standards established by the Federal Rules of Civil Procedure:

(1) The appeals court erred as a matter of law in dismissing the petitioner's complaint for 42 U.S.C.§1983 due process violations by not making any *de novo* review of the "sufficiency of the facts" as required under Rule 12(b)(6). The court made equally serious errors of law when it abused its discretion, thus acting as both judge and jury, when it decided that the respondents' extrinsic evidence "outside the pleadings" was the only "credible" evidence in the case. Then the court, in violation of both Rules 12(b)(6) and Rule 56(c), accepted that extrinsic evidence into the record and used it as the basis for the court's dismissal of petitioner's claim without making the required legal conversion to a summary judgment standard of evidence, mandated by the rules when such evidence is accepted and relied on by a court. The petitioner was likewise deprived of any opportunity under Rule 56(e) to present "all material relevant" such as affidavits, depositions,

and additional testimony, to meet the summary judgment standard of proving existence of a "genuine issue of material fact" for jury trial.

(2) The appeals court erred as a matter of law when it failed to make a Rule 56(c) review of the court record as a whole including petitioner's evidentiary documents of depositions, interrogatories, affidavits, medical records and official documents, before the court granted respondent university summary judgment as a "matter of law," denying petitioner's ADA claims of discrimination and retaliation. Notwithstanding the mandate of Rule 56(c), the appeals court ignored petitioner's evidentiary documents as having "no credence" to prove "a genuine issue of material fact." The appeals court also erred in again determining, as both judge and jury, that the *uncorroborated* statements of the respondent's supervisor were the only "credible" evidence in the case, and used that as the basis for granting the university summary judgment as a matter of law.

The Federal Rules of Civil Procedure, legislated by the U.S. Congress and approved by the U.S. Supreme Court, are formulated with specificity so that these evidentiary standards spelled out in the rules will be uniformly applied by all of the federal judiciary.

The petitioner urgently and humbly requests that the Supreme Court grant this request for writ of certiorari and, in so doing, exercise its supervisory role over the federal judiciary in the fourth circuit so that it will properly implement evidentiary standards mandated by Rules 12(b)(6) and 56 in granting either a motion to dismiss or a motion for summary judgment in a manner consistent with the rule of law so that the "little man" is not deprived unfairly of his "day in court."

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-1147
CA-00-742-PJM

[Filed July 23, 2002]

THOMAS PALOTAI, Plaintiff-Appellant,	)
v.	)
UNIVERSITY OF MARYLAND AT COLLEGE PARK; HENRY MITYGA; LAURIE HELLMAN-AKER, Defendants-Appellees.	)

ORDER

Appellant has filed a petition for rehearing. The Court denies the petition for rehearing.

For the Court,

/s/ _____
Patricia S. Connor
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 01-1147

[Filed June 27, 2002]

THOMAS PALOTAI,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
UNIVERSITY OF MARYLAND AT COLLEGE PARK; HENRY MITYGA; LAURIE HELLMAN-AKER,	)
Defendants-Appellees.	)
	)

Appeal from the United States District Court
for the District of Maryland, at Greenbelt
Peter J. Messitte, District Judge
(CA-00-742-PJM)

JUDGES:
Before MICHAEL and MOTZ, Circuit Judges, and Walter K. STAPLETON, Senior Circuit Judge of the United States Court of Appeals for the Third Circuit, sitting by designation. Senior Judge Stapleton wrote the opinion, in which Judge Michael and Judge Motz joined.

OPINION

STAPLETON, Senior Circuit Judge:

Appellant Thomas Palotai filed a complaint in a Maryland state court asserting that the University of Maryland and individuals associated with running the University Greenhouse violated his rights under the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq. He also alleged that these defendants infringed his federal and state due process rights by failing to give him a timely and fair hearing on his suspension without pay and the termination of his employment with the University. The defendants removed the case to federal court.[1] The District Court dismissed the due process claims and subsequently granted summary judgment on the remaining ADA claims. Palotai timely appealed.

I

A. *Factual Background*

Palotai worked from November of 1994 to June of 1997 as an Agricultural Technician in the Greenhouse operated by the University of Maryland's Department of Natural Resource Sciences and Landscape Architecture. The Greenhouse is maintained for the care of plant specimens used for both research and teaching. It is essential that the plant material which the faculty entrusts to the Greenhouse be

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[1] The University waived its Eleventh Amendment immunity by removing the case against it to the District Court. *See Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. __, 152 L. Ed. 2d 806, 122 S. Ct. 1640 (2002).

maintained in strict accordance with the specifications provided.

Palotai's "responsibilities included supervision of all aspects of plant care and maintenance, pest control, maintenance of all spraying and other equipment, treatment of cooling system, and disposal of hazardous wastes." App. at 13-14. According to Palotai, he had difficulty performing some of his required tasks within the appropriate deadlines because of a learning disability. Palotai informed Pamela McGrath, the Assistant Manager of the Greenhouse, of this disability in June of 1995.

In the summer of 1996, Laurie Hellman-Aker, the Greenhouse Manager, created a system of "time frames." This was a schedule that let Palotai know how much time he was to allot to each task. Palotai expressed concern about these "time frames," and during the summer, six meetings were held to discuss Palotai's concerns. After each one, Hellman-Aker reprimanded Palotai for failing to comply with the stipulated schedule. The University kept the "time frames" in place.

Later that fall, Palotai suffered an accidental eye injury while spraying the Greenhouse with pesticides. He claims that as a result of this injury he was blind in one eye and told Hellman-Aker that he would not be able to perform his responsibilities. Despite Palotai's protestations, Hellman-Aker continued to require him to spray the Greenhouse with pesticides. The complaint alleges that because he was unable to read his work list due to the blindness, Palotai sprayed the wrong section of the Greenhouse. In reaction to this incident, Hellman-Akers issued Palotai a five-day unpaid suspension,

effective October 10, 1996.

On October 16, 1996, Palotai filed a discrimination complaint with the University's EEOC office. The complaint was investigated and resulted in a finding of "no discrimination."

On October 17, 1996, after his treating ophthalmologist advised him that he could not work with pesticides, Palotai told Hellman-Aker that he could not work until his eye was healed, and requested that he be placed on sick leave until testing on his eye was complete. In response to this request, Hellman-Aker extended the suspension an additional day, then placed Palotai on sick leave. Palotai remained on sick leave until early December.

At about the same time, Palotai wrote to the University EEO counselor requesting that the University make a "reasonable accommodation" for his disability by removing the time frames from his work assignments. Hellman-Aker responded to this request one month later indicating that she believed that the time frames were beneficial to Palotai's work habits. On February 23, 1997, Palotai requested a transfer out of the Greenhouse; that request was denied.

On June 5, 1997, Palotai received a letter from Professor Richard A. Weismiller, Chair of the Department, that stated in part as follows:

> In accordance with Section VIII of the University of Maryland *Personnel Policies and Rules for Classified Employees*, I am writing to inform you that effective immediately you are

suspended without pay from your position of Agricultural Technician III, pending the filing of charges for your removal.

This action is the result of your continued disregard for rules, directions and safety standards in the Greenhouse. On Friday, May 30, 1997, you were verbally counseled by your supervisor for failing to wear protective eye equipment while in the greenhouse area during the re-entry interval as required by E.P.A. Worker Protection Standards. This is particularly disturbing in light of your eye injury last fall which occurred as a result of your failure to comply with these standards. On Monday, June 2, 1997, you again disregarded instructions in your failure to accurately record pesticide applications for each greenhouse as required by your supervisor to meet Maryland Department of Agriculture standards. On Wednesday morning, June 4, 1997, you were found without appropriate protective eyewear in an area which had been sprayed the night before. This morning, June 5, 1997, you were working in shorts in an area requiring protective legwear. These incidents, together with your disciplinary history and record of disregarding Greenhouse rules, leave me no choice but to take this action.

App. at 412.

Palotai had no prior notice of this suspension without pay. When Professor Weismiller made the decision to suspend Palotai, he was familiar with Palotai's disciplinary record over the preceding two and a half years which revealed that Greenhouse administrators had reprimanded Palotai at least 42 times. His information about the events of May 30th through June 5th came directly from Palotai's immediate supervisor, Ms. Hellman-Aker. He did not independently investigate the facts before making his decision.

Palotai immediately appealed his suspension. On June 17, 1997, Palotai received charges for removal from the University. Palotai also appealed the removal charges.

B. *Suspension, Termination, and Administrative Review*

The governing regulations of the University provide that a hearing will be held within five working days after an employee appeals a suspension. The hearing on Palotai's suspension was convened on July 10, 1997. The hearing was not completed on that date, however, and was continued until August 14, 1997. The Hearing Examiner issued a decision one week after the completion of the hearing, on August 21, 1997. In that decision, the Examiner found that "Mr. Palotai's position as an Agricultural Technician requires him to work closely with extremely dangerous chemicals." Decision of the Hearing Examiner at 6. Further, the Examiner concluded, "given the potential for severe injury to Mr. Palotai and liability to the University as a result of the failure to take appropriate safety measures when handling pesticides and other chemicals in the greenhouses, the only viable option available to the University is to suspend this employee pending final disposition of the charges." *Id.*

Prior to a resolution of the suspension issue, Palotai received his formal charges of removal. Palotai timely requested a hearing on his termination. In the case of removal, Section 13-205(a) of the Maryland Code provides:

> Within 5 days from the date on which the employee receives the charges for removal as evidenced by the return receipt or other evidence of delivery of the charges to the employee an employee who is suspended under charges for removal may request an opportunity to be heard in his own defense. Within 30 days if possible after receipt, the president or the president's designated representative shall investigate the charges and give the employee an opportunity to be heard. Testimony shall be taken under oath and both the department head or chairman or designee and the employee have the right of representation by counsel and the right to pre sent witnesses and give evidence.

Md. Code Ann., Educ., § 13-205(a). If still unresolved after the president of the institution considers the matter, the employee may submit the grievance to arbitration or to the Office of Administrative Hearings (the "OAH"). *See id.* at § 13-203(d).

Over sixteen months after requesting a hearing on the removal charges, on November 2, 1998, Palotai received a hearing from the University. The University issued a decision upholding the termination on December 23, 1998. Palotai filed an appeal to the OAH on January 8, 1999. A hearing

was held on February 24, 1999 and a decision affirming the charges of removal issued on March 11, 1999. Pursuant to the Maryland Code, Palotai requested judicial review of this decision on March 16, 1999. Palotai claimed in part that the proceedings before the OAH regarding his termination violated his due process rights. The Circuit Court for Prince George's County, Maryland, entered an order on February 29, 2000, affirming the decision of the OAH which was in turn affirmed by the Maryland Court of Special Appeals on March 19, 2001. The Maryland Court of Appeals denied certiorari on September 14, 2001.

C. *The Present Lawsuit*

Prior to receiving a decision from the state court on his request for judicial review of the removal charges, Palotai filed an eight count complaint in state court against the University of Maryland, Hellman-Aker, and Henry Mityga, the faculty member having the responsibility of overseeing the operation of the greenhouse. According to Palotai, the defendants violated the ADA (Counts I and II); the Due Process Clause of the Fourteenth Amendment (Counts III, IV, V, and VI); and Articles 19 & 24 of the Maryland Declaration of Rights, the state law counterpart to the Due Process Clause (Counts VII and VIII).

Following removal to the District Court, the individual defendants and the University moved to dismiss. In the responsive pleadings to those motions, Palotai conceded that individuals cannot be held liable under the ADA, and voluntarily withdrew his claims against HellmanAker and Mityga under the ADA. Further, Palotai voluntarily withdrew claims IV and VI, which alleged due process claims against

the University because the institution is not a proper defendant under 42 U.S.C. § 1983.

The Court dismissed with prejudice Counts III and VII, which stated due process claims against the individual defendants for failing to provide a suspension hearing within an appropriate time frame. It dismissed for lack of jurisdiction Counts V and VIII, which asserted due process claims relating to the termination hearing. The Court's order granted Palotai an opportunity to amend his complaint to set forth his ADA claims with greater specificity.

Three months after Palotai filed his First Amended Complaint, the state filed a motion for summary judgment on the ADA claims. The Court granted defendants' motion finding that Palotai had not tendered evidence tending to show (1) that he was disabled under the ADA or (2) that there was a causal connection between any disability and his suspension or removal.

II

A. *The Suspension Hearing Claims*

Palotai claims that the University violated his due process rights by failing to provide a hearing prior to suspending him without pay. He further insists that his post-suspension hearing was constitutionally infirm.

We will assume for present purposes that Palotai had a cognizable property interest in his job that triggered the protection afforded by the Due Process Clause. *See, e.g, FDIC v. Mallen*, 486 U.S. 230, 240, 100 L. Ed. 2d 265, 108

S. Ct. 1780 (1988). Thus, we will proceed to determine what process the state owed Palotai, and whether the state met that threshold. *See Morrissey v. Brewer*, 408 U.S. 471, 481, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972) ("Once it is determined that due process applies, the question remains what process is due.").

Although there is a preference for pre-deprivation process to protect an individual's property interest, post-deprivation process will suffice in certain situations. *See Gilbert v. Homar*, 520 U.S. 924, 930, 138 L. Ed. 2d 120, 117 S. Ct. 1807 (1997). Where there is an "important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted," the state may be justified in delaying "the opportunity to be heard until after the initial deprivation." *Mallen*, 486 U.S. at 240. Where the state has "probable cause to believe" that the employee's continuing employment will jeopardize an important governmental interest, there is the required assurance that the deprivation is not baseless or unwarranted. *Barry v. Barchi*, 443 U.S. 55, 65, 61 L. Ed. 2d 365, 99 S. Ct. 2642 (1979). This was such a situation.[2]

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[2] We note at the outset of our analysis of this issue that Palotai in his briefing before us does not object to the District Court's consideration of portions of the record other than the allegations of the complaint in the course of granting the defendants' motion to dismiss. Indeed, Palotai's brief relies heavily on the deposition testimony of Professor Weismiller in support of his position. Accordingly, it is appropriate for us to rely on uncontradicted portions of the record other than the allegations of the complaint.

As the Hearing Examiner ultimately found, the University had an important interest not only in the mission of the greenhouse facility and the safety of those employed there, but also in avoiding the legal and other potential consequences of misuse of the toxic chemicals at that facility. Based on the information he received from the manager of the greenhouse and Palotai's immediate supervisor, Professor Weismiller had reason to believe that Palotai had violated safety rules relating to the use of those toxic chemicals on four occasions within a week and had disregarded three reprimands for having done so. This, combined with Palotai's overall disciplinary record, gave ample cause to believe that further misuse of toxic substances would be likely to occur if Palotai were permitted to continue working at the greenhouse.

Palotai does not dispute that the University has an important interest in avoiding the potential consequences of the misuse of toxic chemicals. He insists that the reprimands between May 30th and June 5th, as well as many of the earlier reprimands, were not justified and that Professor Weismiller should have conducted an independent investigation or at least talked with him before issuing the suspension letter. Investigations and hearings with the notice required to make them meaningful take time, however, and the state is not required to take that time when it has probable cause to believe that immediate suspension is required to serve its important interest. Ms. HellmanAker held a responsible position at the University, was Palotai's direct supervisor, and was a participant in many of the reprimands. Her report provided the required probable cause without the necessity of corroborating evidence. The failure to give Palotai a presuspension hearing did not violate his due process rights.

Nor can Palotai justifiably claim that his post-suspension hearing was constitutionally infirm. First, the delay in holding the hearing was not impermissibly long. "Even though there is a point at which an unjustified delay in completing a post-deprivation proceeding 'would become a constitutional violation,' . . . the significance of such a delay cannot be evaluated in a vacuum." *Mallen, 486 U.S. at 242* (citation omitted). Courts must consider "the importance of the private interest and the harm to this interest occasioned by delay; the justification offered by the Government for delay and its relation to the underlying governmental interest; and the likelihood that the interim decision may have been mistaken." *Id.*

The hearing commenced approximately one month after Palotai's suspension and the hearing was continued for approximately five weeks until August 14, 1997. The total delay between the suspension and Hearing Examiner's decision was approximately two and a half months. Under the circumstances, this delay was not so extensive as to be impermissible. *See, e.g.*, *Mallen*, 486 U.S. at 243 (allowing a 90 day delay for continuing suspension). Palotai claims that the defendants continued the hearing through July and August because Hellman-Aker was on family leave. If so, the desirability of having a key witness available at the hearing seems apparent and indicates that the delay was not without legitimate justification.

We do not find it significant that the Maryland law requires a hearing on removal charges within 5 days of the appeal of the deprivation. Violation of a state-mandated procedure does not constitute a violation of constitutional due process protections. *See Morris v. City of Danville*, 744 F.2d

1041, 1048 n.9 (4th Cir. 1984) (recognizing that the "mere fact that a state agency violates its own procedures does not, *ipso facto*, mean that it has contravened federal due process requirements").

Lastly, Palotai claims that the hearing "violated [his] substantive constitutional due process rights because [he] was denied a fair trial." Appellant's Brief at 53. His argument is that the hearing examiner was biased. We can find no discernible bias in the Hearing Examiner's conduct or reasoning. She considered both Palotai's and the University's evidence and made reasonable findings based on that evidence.

B. *The Termination Hearing Claims*

The District Court dismissed the due process claims related to the termination hearing because no federal court other than the Supreme Court has jurisdiction to review a state court judgment. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 75 L. Ed. 2d 206, 103 S. Ct. 1303 (1983); *Guess v. Board of Med. Exam'rs of North Carolina*, 967 F.2d 998 (4th Cir. 1992). This rule, commonly known as the Rooker-Feldman doctrine, applies even to constitutional claims where such claims are "inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's [claim]." *Feldman*, 460 U.S. at 483-84 n.16; *Czura v. Supreme Court of South Carolina*, 813 F.2d 644, 646 (4th Cir. 1987).

Here, the Circuit Court for Prince George's County considered Palotai's claims of substantive and procedural due process violations in its review of the termination hearing.

That court held that the ALJ provided Palotai a fair procedure to submit evidence and that the ALJ considered the evidence Palotai chose to submit. Further, the state court gave credence to the ALJ's finding that the major delays in the process were due to Palotai, not the University. And any minor delay, such as the one between the hearing and the issuing of the decision, was found not to prejudice Palotai. Accordingly, the court declined to find due process violations.

The District Court properly held that it could not rule on Palotai's claims regarding the termination hearing without reviewing the outstanding state court's judgment. Thus, we will affirm the District Court's decision to dismiss these claims for want of jurisdiction under the Rooker-Feldman doctrine.[3]

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[3] Appellant alleges that the University of Maryland violated both his federal and state due process rights. Appellant's state due process claims are based on Articles 19 and 24 of the Maryland Constitution. The Court of Appeals of Maryland has held that the due process clauses of the Maryland Constitution have the same meaning as the Due Process Clause of the Fourteenth Amendment of the Federal Constitution. *See Department of Transp., Motor Vehicle Admin. v. Armacost*, 299 Md. 392, 474 A.2d 191 (Md. 1984); *see also Sanner v. Trustees of Shippard and Enoch Pratt Hosp.*, 278 F. Supp. 138, 141 (D. Md.), *aff'd*, 398 F.2d 226 (4th Cir. 1968) ("In construing [Articles 19, 20, and 23 (now 24)] the Maryland court has held that the decisions of the Supreme Court are practically direct authority."). Thus, having concluded that Palotai's complaint failed to state a cause of action under the Due Process Clause of the United States Constitution, the District Court properly determined that the claim under the Maryland Constitution had to be dismissed as well.

III

We will also affirm the summary judgment entered by the District Court on Palotai's ADA claim for essentially the reasons given by it.

Palotai alleges that the University violated his rights under the ADA by imposing arbitrary "time frames" on him because of his disabilities and by refusing his request to accommodate his disabilities by dispensing with those time frames. To succeed on these claims, Palotai must first show that he is "disabled" within the meaning of the ADA. *See Rhoads v. FDIC*, 257 F.3d 373, 387 (4th Cir. 2001). The ADA defines a "disability" in part as "a physical or mental impairment that substantially limits one or more of the major life activities." 42 U.S.C. § 12102(2)(A). Examples of major life activities are "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i). When the major life activity at issue is working, "the inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." *Id.* at. § 1630.2(j)(3)(i). The determination of whether an individual is disabled is an individualized inquiry, particular to the facts of each case. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483, 144 L. Ed. 2d 450, 119 S. Ct. 2139 (1999). "The phrase 'substantially limits' sets a threshold that excludes minor impairments from coverage under the ADA." *EEOC v. Sara Lee Corp.*, 237 F.3d 349, 352 (4th Cir. 2001). "Substantially limits" means:

> (i) Unable to perform a major life activity that the average person in the general population

> can perform; or
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(i)-(ii).

The impairments that are alleged to make Palotai "disabled" are: (1) "learning disabilities"; (2) "obsessive/compulsive disorder" (OCD); and (3) "recurrent central serous retinopathy." The last is alleged to be a substantial impairment on the major life activity of seeing, and the first and second are said to be substantial impairments on the major life activities of learning and working. The record contains evidence that would support a finding that Palotai has each of these conditions. As the District Court noted, however, the record does not contain evidence that would support a finding that he has a legally relevant disability for purposes of his ADA claim.

With respect to Palotai's learning disabilities, upon which he places primary reliance, the record contains no evidence from which a trier of fact could conclude that they substantially limit his ability to work or his ability to learn in any way here relevant. To the extent Palotai is relying on the proposition that his "learning disabilities" substantially limit his ability to work, he must show that this disability precluded him from a substantial class of jobs. *See* 29 C.F.R. §

1630.2(j)(3)(i). This he has not done.

To the extent that Palotai claims that his learning disabilities substantially limit the major life activity of learning, Palotai must show that his impairment significantly restricts his ability to learn. In evaluating this claim, we must consider whether Palotai is unable to learn in comparison to the average person in the general population.

The record evidencing that Palotai has learning disabilities consists of a report of a psychologist, following testing in April of 1994. Its purpose was not to compare Palotai's ability to learn with that of an average person in the general population and, not surprisingly, it does not provide a basis for doing so. This deficiency is particularly crucial in a case like this one in which the person claiming a significant limitation on his ability to learn has a demonstrated record of academic achievement and has been able to quickly learn skills required by the only working experience documented in the record. As of the time of his employment with the University, Palotai had a B.S. degree in biology and the sciences and had 30 hours of graduate work in education. When Palotai first came to the University, he had no difficulty in promptly mastering the responsibilities of his job. As his brief describes his experience during his probationary period:

> The record proves that the Appellant adequately performed the essential functions of his Ag Tech job in accordance with his official position description. In the Greenhouses, the Appellant supervised all aspects of plant care and maintenance, pest program control, treatment of the cooling system with Triathlon,

> and the disposal of hazardous materials. It was the Appellant, not Hellman-Aker, who supervised and trained the college students working as hourly employees in the Greenhouse. Appellant trained the new employees in all aspects of plant care and maintenance [watering, ventilation, trimming and propagation of new plants,] and in the pest program [spraying and regulations].
>
> Appellant's performance rating after initial probation indicated that he performed all job functions in a satisfactory manner.

Appellant's Reply Br. at 2 (citing App. at 192).

With respect to Palotai's OCD, the record contains two handwritten, barely legible reports of psychiatrists dating from late 1996, one of which describes Palotai as having "compulsions" and "obsessions." Neither, however, would support a finding that his OCD rendered him unable to perform a substantial class of jobs or that his capacity to learn is less than the average person in the general population.

Lastly, Palotai cannot demonstrate this his eye impairment constitutes a disability. The record evidences that two ophthalmologists diagnosed Palotai as having central serous retinopathy. Their reports reveal the following:

1. Palotai first presented with central serous retinopathy in December of 1995. The problem "resolved spontaneously." App. at 183.

2. The central serous retinopathy returned in October of 1996 and his vision in his left eye dropped to 20/200. The problem was treated successfully with laser surgery and the vision returned to 20/25.

3. On July 2, 1997, his vision was 20/40 in the left eye.

4. On May 29, 1998, his vision was 20/40 in his left eye and 20/30 in his right. Palotai reported that he felt his vision had gradually improved since his surgery in 1996.

5. While there was "no evidence of active retinopathy" in May 1998, Palotai "is at risk for further episodes of central serous." App. at 183.

6. "Based on AMA guidelines, Mr. Palotai's left eye is 15% impaired with the five Maryland disability factors applied." *Id.*

We agree with the District Court that this record would not support a finding that Palotai's central serous retinopathy constituted a "disability" for purposes of the ADA during any period relevant here. *See Albertson's Inc. v. Kirkingburg*, 527 U.S. 555, 559, 566, 144 L. Ed. 2d 518, 119 S. Ct. 2162 (1999) (evidence of "amblyopia, an uncorrectable condition that [left plaintiff] with 20/200 vision in his left eye and monocular vision in effect" did not alone establish that plaintiff was "disabled"); *Pollard v. High's of Baltimore, Inc.*, 281 F.3d 462, 468 (4th Cir. 2002) (". . . a temporary impairment, such as recuperation from surgery, will generally not qualify as a disability under the ADA. . . An impairment simply cannot be a substantial limitation on a

major life activity if it is expected to improve in a relatively short period of time.").

Moreover, even assuming that Palotai could establish that his impairments constituted a disability under the ADA, we agree with the District Court that the "time frames" resulted from the demands of the job, and that any accommodation involving the elimination of time constraints and deadlines was not a reasonable one. As the District Court put it:

> The core of the case, however, has to do with the time frames that are established, and that they were inequitably imposed upon the plaintiff. That seems to be the issue that the plaintiff says is the core of his case, and the removal of the time frames is what he was seeking.
>
> The defendant argues that this is essentially an open ended work schedule and that would not be a fair, reason able accommodation, but one has to look specifically at the context of the job that the plaintiff held. He was in a green house involving plants.
>
> In the letter from Ms. Hellman-Aker to Mr. Palotai sent in 1997, the language, it seems to me, is quite relevant when one considers whether there even could be a reasonable accommodation in this case, assuming a learning disability, assuming that it

somehow substantially limited activities, assuming that there was a request for reasonable accommodation ultimately. The question has to be whether there could be a reasonable accommodation for someone similarly placed as plaintiff.

Here is what Ms. Hellman-Aker says.

"Performance of your functions on a strict time schedule is an essential function of your position. As you know, living plant material that exists as part of a research project or specimens for teaching must be cared for according to the exact specifications provided. As little as thirty (30) minutes sometimes makes the difference between a quality plant or a dead plant. The importance of time management and prompt completion of assigned duties is made all the more important due to the limited staffing available within green house budget constraints.

It is critical that University plant material be cared for four times a day to ensure healthy growth and survival. Such a schedule is necessary due to the sheer mass and diversity of plantlife maintained at the greenhouse. To ensure the highest quality of care, the greenhouse has developed the following schedule for watering and venting: morning watering and venting, noon check, afternoon watering and venting; an evening

> walk-through. If the plants are not checked in a timely manner, the result is poor plant growth or death. In the summer, if ventilation is not completed by 10:00 a.m., plants may be lost or become severely stressed. Greenhouse temperatures can easily exceed 120 degrees F. Soil sterilization occurs at 150 degrees F. In the winter months, if vents are left open, plants freeze or are stressed due to cold temperatures. Accordingly, it is imperative that watering and venting be performed on a timely basis.
>
> Similarly, it is imperative that pesticide applications be made in a timely fashion. Due to EPA WPS laws and general safety considerations, these applications must be coordinated around classes, employees, researchers, and weather conditions. If the applications are not performed as scheduled, windows of opportunity for spraying may be missed, directly impacting on client service."

* * *

The Court finds that there really is no material issue, genuine issue of material fact in this regard as to, at a minimum, the inability of the defendant to accommodate plaintiff as he saw it; that is, that the reasonable accommodation sought by the plaintiff was not in fact reasonable, even assuming, as I say, that he had a disability that affected one of his major life activities.

The Court finds, however, as a matter of law that the plaintiff has not adduced a sufficient demonstration that he was in fact unable to work in other positions or that his learning disability in fact was the cause of his inability to perform in a timely fashion. As I say, a reasonable accommodation, to the extent that it could have been given, was given. It could not have been given as a matter of law in the manner that plaintiff requested.

Mot. Summ. J. Hr'g Tr. at 58-62. We agree.[4]

IV

Accordingly, the District Court's order of July 18, 2000, dismissing the due process claims and its summary judgment in favor of the defendants on the ADA claims will be affirmed.

AFFIRMED

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[4] Palotai asserted a retaliation claim in the District Court alleging that he had been terminated on June 17, 1997, in retaliation for the filing of his EEOC complaint on October 16, 1996. We do not understand him to claim before us that the District Court's summary judgment against him on this claim was reversible error. We agree with the District Court's disposition of this claim, however. Viewing the summary judgment record as a whole, including the eight month period between the complaint and Palotai's termination, a trier of fact could not reasonably conclude that the University's articulated reasons for his reprimands and termination were pretextual and that the real reason was activity protected by the ADA.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. PJM 00-742

[Filed January 5, 2001]

THOMAS PALOTAI,	)
Plaintiff,	)
	)
v.	)
	)
UNIVERSITY OF MARYLAND	)
COLLEGE PARK, et al.,	)
Defendants.	)
	)

FINAL ORDER

Upon consideration of Defendant's Motion for Summary Judgment and Plaintiff's Opposition thereto, it is for the reasons stated on the record this 5th day of January, 2001

ORDERED that Defendant's Motion is hereby GRANTED; and it is further

ORDERED that final judgment is hereby ENTERED in favor of Defendant University of Maryland College Park, et al.; and it is further

ORDERED that the Clerk of Court shall CLOSE this case.

/s/ _____
Peter J. Messitte
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. PJM 00-742

[Filed July 18, 2000]

THOMAS PALOTAI,	)
Plaintiff,	)
	)
v.	)
	)
UNIVERSITY OF MARYLAND	)
COLLEGE PARK, et al.,	)
Defendants.	)
	)

ORDER

Upon consideration of Defendants' Motion to Dismiss, it is for the reasons stated on the record 14 day of July, 2000.

ORDERED:

1) Defendants' Motion to Dismiss is GRANTED as follows;

2) As to Count I (Violation of ADA - Discrimination), the Count is WITHDRAWN as to the Individual Defendants, but REMAINS as to Defendant University;

3) As to Count II (Violation of ADA - Retaliation), the Count is WITHDRAWN as to the Individual Defendants;

4) As to Count II (Violation of ADA - Retaliation), the Count is DISMISSED WITHOUT PREJUDICE as to Defendant University and Plaintiff shall have 15 days LEAVE TO FILE an Amended Count II as to Defendant University, specifying all acts of retaliation relied upon;

5) As to Count III (Violation of Section 1983 - Suspension Hearing - Individual Defendants), the Count is DISMISSED WITH PREJUDICE;

6) As to Count IV (Violation of Section 1983 - Suspension Hearing - Defendant University), the Cont is WITHDRAWN;

7) As to Count V (Violation of Section 1983 - Removal Hearing - Individual Defendants), the Count is DISMISSED WITHOUT PREJUDICE;

8) As to Count VI (Violation of Civil Rights - Removal Hearing - Defendant University), the Count is WITHDRAWN;

9) As to Count VII (Violation of Md. Declaration of Rights - Suspension Hearing), the Count is WITHDRAWN as to Defendant University;

10) As to Count VII (Violation of Md. Declaration of Rights - Suspension Hearing), the Count is DISMISSED WITH PREJUDICE as to the Individual Defendants;

11) As to Count VIII (Violation of Md. Declaration of Rights - Removal Hearing), the Count is WITHDRAWN as to Defendant University;

12) As to Count VIII (Violation of Maryland Declaration of Rights - Removal Hearing), the Count is DISMISSED WITHOUT PREJUDICE as to the Individual Defendants;

13) This Order shall not affect the present Scheduling Order, except that the parties shall have until October 1, 2000 to designate their experts.

/s/ _____
Peter J. Messitte
United States District Judge